FILED
NOV 28 1951
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 449

BEDFORD F. FOSTER,

Petitioner,

vs.

THE UNITED STATES,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner (Plaintiff below and here so designated) respectfully petitions this Court for a writ of certiorari to review a judgment of the Court of Claims, entered July 9, 1951, and an order of that Court denying Plaintiff's motion for a new trial, entered October 2, 1951.

Statement of the Case

The facts are precisely as found by the Court of Claims. While on military duty near St. Malo, France, in August, 1944, Plaintiff found a lady's overnight bag, containing cosmetics, clothes and a purse filled with francs. He took

the purse and currency to the command post where he left it, after asserting he would lay claim to it.

Later he sent the money to the finance officer whose receipt converted the francs into $4129.12 U. S. funds and stated, "Collection of French currency abandoned by German troops, discovered & turned over to Finance Officer . . . by remitter, (Plaintiff)."

When this receipt was delivered to him, Plaintiff objected and informed the finance officer the francs were not "abandoned by German troops." The finance officer offered to return the francs and retake the receipt but Plaintiff was unable to carry such property on his person in battle.

After the war he filed claim for the money but was informed by the Army that the funds had been turned in to the general fund of the Treasury. No other person claimed the francs nor was their original owner identified. There were no women among the German troops then being engaged.

Statutes and Treaty Involved

(As of August, 1944, when incident occurred)

Captured property to be secured for public service (article 79)—All public property taken from the enemy is the property of the United States and shall be secured for the service of the United States, and any person subject to military law who neglects to secure such property or is guilty of a wrongful appropriation thereof shall be punished as a court-martial may direct. (June 4, 1920, c. 227, subchapter II, § 1, 41 Stat. 804, 10 U. S. C. 1551).

Dealing in captured or abandoned property (article 80)—Any person subject to military law who buys, sells, trades or in any way deals in or disposes of captured or abandoned property, whereby he shall receive or expect any profit,

benefit or advantage to himself or to any other person directly or indirectly connected with himself, or who fails whenever such property comes into his possession or custody or within his control to give notice thereof to the proper authority and to turn over such property to the proper authority without delay, shall, on conviction thereof, be punished by fines or imprisonment, or by such other punishment as a court-martial, military commission or other military tribunal may adjudge, or by any or all of said penalties. (June 4, 1920, c. 27, subchapter II, § 1, 41 Stat. 804, 10 U. S. C. 1552).

(As Recodified in 1950)

Captured or Abandoned Property (article 103)—

(a) All persons subject to this code shall secure all public property taken from the enemy for the service of the United States, and shall give notice and turn over to the proper authority without delay all captured or abandoned property in their possession, custody or control.

(b) Any person subject to this code who—

(1) fails to carry out the duties prescribed in subdivision (a) of this article; or

(2) buys, sells, trades, or in any way deals in or disposes of captured or abandoned property, whereby, he shall receive or expect any profit, benefit or advantage to himself or another directly or indirectly connected with himself; or

(3) engages in looting or pillaging shall be punished as a court-martial may direct. (May 5, 1950, c. 169, § 1, 64 Stat. 138, 50 U. S. C. 697).

Hague Conventions No. IV, ratified February 23, 1909 (Malloy, Treaties, Vol. II)

Article XLVI—. . . private property . . . must be respected. . . . Private property cannot be confiscated.

Article LIII—An army of occupation can only take possession of cash, funds and realizable securities which are strictly the property of the State . . .

Questions Presented

1. What law applies to lost or abandoned property found by an American soldier while serving on foreign soil?

2. If such property is unclaimed and its original owner is not identified, is the finder or the United States Government entitled to said property?

3. May the United States confiscate such property without any hearing for claimants?

4. May the Court of Claims decree that which, because of treaties, Congress could not enact?

Reasons for Allowance of Writ

Most of these questions are novel. Neither counsel nor the Court of Claims cited a single case dealing with the findings of an American soldier overseas. Yet tens of thousands are in that position every day.

If the Court of Claims decision stands, it will constitute a breach by the United States of one of the basic treaties among nations, The Hague Conventions.

Argument

1. Congress Did Not and Could Not Act to Claim Such Property for the Government.

The greatly-expanded scope of America's military activities led Congress to codify the Articles of War after World War I and then to enact the Uniform Code of Military Justice in the wake of World War II. Therein Congress dealt with some phases of the property question.

Congress reiterated the public policy that "public property taken from the enemy (is) for the service of the United States . . ." (50 U. S. C. 697). This differed only

slightly from the predecessor article which had declared, "All public property taken from the enemy is the property of the United States and shall be secured for the service of the United States . . ." (10 U. S. C. 1552).

As to property generally, the old Article (10 U. S. C. 1552) required the holder thereof to report the same "to the proper authority and to turn over such property without delay, . . ." under penalty of court-martial. The successor Article (50 U. S. C. 687) does not include this language but speaks of court-martial of one who "buys, sells, trades or in any way deals in or disposes of captured or abandoned property . . ."

We are not here concerned with the penal provisions, because Plaintiff did immediately report his find and send it on its way to the finance officer. We are, however, struck with the fact that Congress at neither time has laid claim to private property "for the service of the United States."

Any such claim would have been clearly repugnant to the letter and spirit of The Hague Conventions (supra), part of the "supreme Law of the Land." (Constitution, Art. VI, Cl. 2).

2. Common Law and French Law Favor the Finder.

In such a situation, the Common Law or, in this case, France's civil law must be applied.

> By the general rule of the common law, one who finds and appropriates a lost chattel . . . acquires the title thereto against all the world except the true owner . . .
>
> Where the finder of a lost article has delivered it to a third person to be kept for the owner, or for the finder in case the owner does not claim it, the finder, on the refusal of the bailee, to return the article, may recover it, if no claim has in the meantime been made by the true owner. (*36 C. J. S. 772*).

For the law of France, where the discovery occurred, we translate from *Droit Civil*, 6th Ed., Vol. 1, Planiol, P. 801:

> Section 2584 . . . There are two ministerial decisions of 1821 and 1925 which have ruled a restitution to be made to the finder of the sums received by the Treasury and originating from the sale of certain objects found on public roads and deposited by the finder with a public official. These decisions set the pattern for the later court decisions.

Amos & Walton's Introduction to French Law (1936) states, at Page 84:

> The bearing of possession upon the title to moveables is even more decisive in France than in England. The dominant principle is expressed in the maxim, "En fair de meubles, la possession vaut titre." Taken literally, these words might mean that possession creates a presumption of ownership or, on the other hand, that the right of the possessor is always unquestionable.

Cochard's French Civil Code (1930) puts it this way:

> Article 2279: Possession is equivalent to a title with respect to personal property. Nevertheless, a person who has lost a thing or from whom it has been stolen can claim it from the person in whose hands he finds it during three years from the day of the loss or theft; . . .

By common law and French civil law, Plaintiff acquired title which the true owner might have challenged for three years but, in the absence of a challenge or claim of ownership from anyone else during all this time, Plaintiff's title became absolute.

3. Government Confiscatory and Arbitrary in Actions.

As the Court of Claims found, Plaintiff made his first formal claim to the Army in November, 1947. Without any

hearing or other determination, the Army replied that the funds had been taken into the Treasury of the United States.

This was confiscation of private property without cause or hearing. The Government seized the funds, put them to its own use, then dared Plaintiff to challenge what it had done. Certainly there was no justification for such conduct.

Respectfully submitted,

NATHAN L. SILBERBERG,
Counsel for Petitioner.

Washington, D. C., November 28, 1951.